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Supreme Court, U.S.
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No. 93-2006

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO,

Petitioner,

v.

SMS HASENCLEVER GMBH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA AND
THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

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The U.S. Council on International Banking and the Institute of International Banking Law and Practice ("Amici") have filed a Motion for Leave to File Brief of *Amici Curiae* ("Motion"). Amici urge the Court to grant Banca Nazionale del Lavoro's ("BNL's") Petition for Writ of Certiorari. They allege that, if the decision of the Georgia Court of Appeals in this case is allowed to stand, there will be apocalyptic ramifications for international banks. Amici's Motion demonstrates an unfamiliarity with both the record and the law at issue in this case and should be denied.

The sole *legal* argument presented in Amici's Motion, as in BNL's Petition, is that the Georgia courts have denied BNL the "safe harbor" granted banks in Section 8(a)(1)(F) of the Export Administration Act ("EAA"), 50 U.S.C. App. § 2407(a)(1)(F). Motion, pp. 7-8. Amici appear to be unaware that, as BNL itself has admitted, this statutory defense is inapplicable by its terms. See, Respondent's Brief in Opposition ("Res. Br."), p. 7.

Amici's other arguments are addressed to alleged effects of the Georgia courts' decision on "the practices and expectations of banks in the United States engaged in international letter of credit transactions."[1] Amici appear to be unaware that the applicable jurisdictional statute and the rules of this Court do not contemplate granting certiorari for this purpose. See, 28 U.S.C. § 1257; U.S. Supreme Court Rules, Rule 10.1(c).

Amici's longest argument is devoted to proving that, as a confirming bank, BNL should have been allowed to dishonor documents if it could not use those documents to obtain reimbursement. Motion, pp. 3-4, n. 4.[2] Amici appear to be unaware

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[1] The quotation appears on the second page of the Motion itself. Other references in the text to Amici's arguments are to pages in the supporting brief.

[2] This argument contravenes fundamental axioms of letter of credit law, embodied in the Uniform Commercial Code, that (a) a confirming bank's obligation to the beneficiary of a letter of credit is wholly independent of its relationship with the bank that issued the credit, and (b) a confirming bank undertakes the risk of non-reimbursement. See, *Hawkland & Holland UCC Series* § 5-114:01 (Art. 5)(1993); *Centrifugal Casting Mach. Co. v. American Bank & Trust Co.*, 966 F.2d 1348, 1352 (10th Cir. 1992). One must question how carefully Amici have considered this argument.

that the entitlement of a confirming bank to dishonor a letter of credit based on alleged reimbursement problems arising out of the beneficiary's documents is an issue of *state* law, which also does not come within the jurisdictional purview of this Court. If Amici believed that the Georgia Court of Appeals had misapplied letter of credit law, they should have intervened before the *Georgia* Supreme Court.

Amici's arguments about the federal policy implications of complying with the Georgia courts' decision betray a fundamental unfamiliarity with both the record and U.S. Antiboycott Regulations. Amici appear to be under the misapprehension, first, that SMS has violated U.S. antiboycott laws by presenting documents with negative certifications to BNL.[3] Motion, p. 3. Amici are evidently unaware that: U.S. Antiboycott Regulations (15 C.F.R. § 769.2(f)(6)) expressly exempt SMS's actions from their prohibitions because SMS is not a U.S. person and because the shipment of goods at issue never entered U.S. commerce; the Commerce Department has confirmed this exemption; and BNL has never disputed it. See, Res. Br., pp. 3-4.

Amici's contention that confirming banks like BNL must be allowed to rely on the "interpretations" of the Commerce Department's Office of Antiboycott Compliance ("OAC") or be caught between violating federal law and incurring liability under state law (Motion, pp. 8-9) fundamentally misconstrues the "interpretation" of the Antiboycott Regulations at issue in this case. Amici appear to be unaware that: the "interpretation" is, in fact, no more than the informal views of a junior bureaucrat; those views are contradicted by the Antiboycott Regulations themselves and the legislative history of the EAA; BNL did not even receive the "interpretation" until *six months after* it had

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[3] Amici also suggest that allowing the Georgia courts' decision to stand would permit letter of credit beneficiaries and account parties to collude in defrauding a confirming bank by submitting documents with negative certifications. Motion, p.3. Once again, Amici are unfamiliar with the record. It is not even *alleged* that such collusion occurred here. If, as a result of the Georgia courts' decision, banks perceive this to be a future problem, they can easily draft around that problem in the credit itself.

dishonored SMS's documents; BNL itself long ago disavowed this interpretation of the Regulations; and BNL has failed, over more than two and a half years, to take any steps to challenge the bureaucrat's obvious misreading of the law. See, Res. Br. at pp. 11-12. Amici, moreover, have surely not fully considered the implications of their argument. Every junior bureaucrat's error or caprice cannot entitle a bank to dishonor tens of millions of dollars in conforming documents under a letter of credit.

Finally, Amici appear to be unaware that the federal government has been fully informed of this litigation all along and has shown no interest in its outcome. OAC, despite requests from BNL, has declined to participate, and the Georgia courts have held that "no reason exists" for joining OAC as a party. Pet. App., pp. 6a-7a. The U.S. Treasury Department, moreover, has *licensed* this litigation and has been served with all briefs and decisions in the case.[4] Although Treasury is the responsible U.S. Government agency, it has evidenced none of Amici's concerns about the implications of the Georgia courts' ruling for international banking.

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[4] Because this lawsuit arguably involves Iraqi interests, Treasury has licensed the litigation (License No. IQ-0243) pursuant to Treasury's Foreign Assets Controls. 31 C.F.R. Part 575. The license requires SMS to file copies of all briefs and court rulings with Treasury.

Amici's Motion is an excellent illustration of why this Court's Rule 37.2 disfavors motions to file *amicus curiae* briefs until after the Court has considered a petition for writ of certiorari and the amicus has had the time to become familiar with the record and the relevant law. The Motion should be denied.

Respectfully submitted,

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[5] SMS's disclosure of affiliated corporations pursuant to Rule 29.1 appears in Res. Br. at p. ii.